AUG 4 - 2003

No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED, PETITIONERS

v.

R.R. DONNELLEY & SONS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record

J. MICHAEL WIGGINS
Acting Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

DENNIS J. DIMSEY
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a claim for racial discrimination relating to the terms or conditions of employment in violation of 42 U.S.C. 1981 is governed by the uniform federal statute of limitations established by 28 U.S.C. 1658(a), or a varying limitaions period borrowed from the law of the forum state.

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INTEREST OF THE UNITED STATES

This case involves 42 U.S.C. 1981 (Section 1981) and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which amended Section 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The availability of actions under Section 1981 affects the United States' role in enforcing Title VII and related civil rights laws. In addition, this case involves the four-year statute of limitations established by 28 U.S.C. 1658(a), which presumptively applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]," *ibid.*, and may apply in actions in which the United States or a federal entity is a party.

STATEMENT

1. a. Section 1981 of Title 42 U.S.C., one of the Nation's oldest civil rights laws, provides that "[a]ll persons within the jurisdiction of the United States shall have the same

right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." 42 U.S.C. 1981(a). In *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171 (1989), this Court held "that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." Rather, the Court explained, Section 1981 protects only two "enumerated rights"—the right "'to make . . . contracts' and 'the same right . . . to . . . enforce contracts.'" *Id.* at 176 (quoting Section 1981). "Where an alleged act of discrimination does not involve the impairment of one of these specific rights," the *Patterson* Court instructed, "§ 1981 provides no relief." *Ibid.*

In 1991, in response to *Patterson*, Congress amended Section 1981 and prohibited discrimination with respect to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, § 101, 105 Stat. 1071 (42 U.S.C. 1981(b)); see § 3(4), 105 Stat. 1071 (Congress's objective was to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 305-308 n.6 (1994).[1] The 1991 Act thus made actionable the very type of employment discrimination that this Court

[1] Section 101 of the 1991 Act amended Section 1981 by redesignating the existing text of the statute as Section 1981(a) and adding subsections (b) and (c). § 101, 105 Stat. 1071. Subsection (b) states: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 101, 105 Stat. 1072. The text of Section 1981, as amended, is set forth in the appendix to this brief.

in *Patterson* held was "not actionable under § 1981." 491 U.S. at 171, 179, 189.

In *Rivers*, 511 U.S. at 300, this Court held that Section 101 of the 1991 Act—the part of the Act at issue in this case—does not apply to Section 1981 actions "that arose before [the 1991 Act] was enacted." The Court explained that, because Section 101 "creates liabilities that had no legal existence before the Act was passed," it does not apply to "preenactment conduct" given the absence of any indication that Congress intended it to apply retroactively. *Id.* at 313. The Court in *Rivers* thus affirmed the dismissal of plaintiffs' claims under Section 1981 for discriminatory discharge, which had accrued before 1991 and were not actionable under Section 1981, as construed in *Patterson*. *Id.* at 301-302.

b. Section 1981 does not set forth a statute of limitations. Following the choice-of-law analysis established by 42 U.S.C. 1988(a), however, courts in Section 1981 actions traditionally have borrowed the limitations period used by the forum state for personal injury actions. Under Section 1988(a), courts look to federal law and, if there is no suitable federal rule, apply the law of the forum state to the extent that doing so would not be inconsistent with federal law. See *Wilson* v. *Garcia*, 471 U.S. 261, 267 (1985). The state limitation periods that have been applied in Section 1981 actions vary from one State to the next, but generally range from two to six years. See note 8, *infra*.

c. On December 1, 1990, Congress enacted a new, catch-all statute of limitations for federal actions. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 313(a), 104 Stat. 5114. It states that, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than

4 years after the cause of action accrues." 28 U.S.C. 1658(a).[2] The statute was an outgrowth of the 1990 report of a committee appointed by the Chief Justice to propose long-range solutions to problems stemming from the increased size and complexity of the case load in federal courts. See *Report of the Federal Courts Study Committee* (1990).

2. Petitioners are African Americans who are former employees of respondent's Chicago manufacturing division and certain other divisions. In November 1996, they brought this class action alleging, *inter alia*, violation of their rights under Section 1981, as amended in 1991. J.A. 9-22. Petitioners allege discriminatory termination and refusal to transfer in connection with the closing of the Chicago division in July 1994, and maintenance of a racially hostile work environment. J.A. 18-19. Respondent moved for partial summary judgment on the ground that petitioners' Section 1981 claims are time-barred because they were brought more than two years after they accrued. Respondent explained that, under prior Seventh Circuit precedent, the statute of limitations for Section 1981 actions in Illinois is the two-year period established by state law for personal injury actions. Petitioners responded that their claims are timely because they are governed by the four-year period established by Section 1658(a). Pet. App. 4a-6a.

The district court held that Section 1658 governs the claims at issue. Pet. App. 28a-40a. The court read Section 1658 to mean that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of

[2] In 2002, Congress amended Section 1658 to add a separate provision (subsection (b)) specifying the statute of limitations for certain securities law claims. Act of July 30, 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 801. The original catch-all provision of the 1990 Act was left unchanged but is now set forth in Section 1658(a).

action." *Id.* at 37a. Accordingly, the court reasoned, "claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date," while "[c]laims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 37a-38a. Applying that understanding, the court held that petitioners' Section 1981 claims "arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by § 1658[]." Pet. App. 40a. The district court certified its ruling for an interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 12a.

3. The Seventh Circuit reversed. Pet. App. 3a-27a. It concluded that Section 1658(a)'s reference to "an Act of Congress enacted" does not encompass an amendment to an existing statute. *Id.* at 18a-19a. Rather, the court explained, "when Congress amends a preexisting statute, it does not create a 'new act,' and claims arising under the statute as amended continue to arise under the preexisting statute." *Id.* at 20a. As a result, in the court's view, Section 1658(a) "applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment." *Id.* at 22a.

Applying that construction, the court of appeals held that the Section 1981 claims at issue are not governed by Section 1658(a). The court acknowledged that "the type of claims on which [petitioners] seek relief did not exist post-*Patterson* and pre-§ 1981(b)." Pet. App. 22a. But although petitioners' claims "depend on" Section 1981(b), the court concluded that "the cause of action for post-formation conduct 'arises under' § 1981(a)," *i.e.*, the provision at issue in *Patterson*. *Id.* at 24a. In so holding, the court emphasized that "Congress chose to

overrule *Patterson* not by creating an entirely new statutory provision," but by supplying "a more precise definition" of the scope of Section 1981. *Id.* at 25a. In addition, the court found it "highly significant" that a committee report accompanying the 1991 Act referred to the fact that courts have historically borrowed state statute of limitations in adjudicating Section 1981 claims. *Ibid.*

SUMMARY OF ARGUMENT

The four-year statute of limitations established by 28 U.S.C. 1658(a) governs a claim for racial discrimination relating to the terms or conditions of employment in violation of 42 U.S.C. 1981—a claim that was not actionable until Congress's enactment of the Civil Rights Act of 1991.

A. By its terms, Section 1658(a)'s catch-all limitations period applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]," unless it is "otherwise provided by law." The pivotal issue in applying Section 1658(a) in this case is the meaning of "arising under." In common parlance, "arise" means to spring up or come into being. In addition, the term "arising under" has a well-known legal meaning in the context of jurisdictional statutes contained in the same title of the United States Code as Section 1658(a). In construing those statutes, this Court has consistently held that a claim "arises under" federal law either if federal law creates the cause of action or the complainant's right to relief necessarily depends on federal law.

B. A Section 1981 claim for racial discrimination relating to the terms or conditions of employment "arises under" the 1991 Act—and thus is subject to Section 1658(a)—under both the dictionary definition of "arise" and the term's common legal meaning. In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), this Court held "that racial harassment relating to the conditions of employment is *not actionable* under § 1981." *Id.* at 171 (emphasis added). In *Rivers* v.

Roadway Express, Inc., 511 U.S. 298 (1994), by contrast, the Court recognized that the same discrimination *is* actionable by virtue of the 1991 Act, which, *inter alia*, expanded Section 1981 to protect "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" (42 U.S.C. 1981(b)). The claims at issue in this case therefore necessarily came into being and became actionable under the 1991 Act because they "had no legal existence before [the 1991] Act was passed." *Rivers*, 511 U.S. at 313.

The fact that a Section 1981 claim alleging discrimination relating to the terms or conditions of employment also depends on Section 1981(a)—the part of the statute at issue in *Patterson*—does not alter the conclusion that such a claim arises under the 1991 Act and thus triggers Section 1658(a). Section 1658(a) does not say that a claim must arise *solely* under an Act of Congress passed after December 1, 1990. In addition, in the jurisdiction context, this Court has long recognized that a claim may arise under federal law even if it is based only *partly* on federal law, as long as federal law creates the cause of action or supplies an essential element for obtaining relief. With respect to the Section 1981 claims at issue in this case, the 1991 Act both creates a cause of action and supplies an essential element of the cause of action, since before the 1991 Act those claims were "not actionable" (*Patterson*, 491 U.S. at 179) at all.

C. None of the secondary considerations relied upon by the court of appeals provides any basis for overriding the result clearly called for by the text of Section 1658(a). If a claim arises under an Act of Congress passed after December 1, 1990, then it is immaterial for purposes of Section 1658(a) whether such an Act amended an existing statute or created a stand-alone cause of action. Just as is true for purposes of the Court's retroactivity analysis, the focus must be on the substantive effect of the Act, not on whether the Act creates a new section of the United States Code, amends

an existing provision, or even simply "operates as a gloss on [existing] terms." *Rivers*, 511 U.S. at 304-305; see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

The court of appeals also erred in concluding that its constructon was necessary in light of legislators' goal—expressed in a committee report—to avoid disruption of litigants' settled expectations. Congress addressed that concern by making Section 1658(a)'s default limitations period prospective only, *i.e.*, by limiting it to claims arising under an Act of Congress passed *after* December 1, 1990. Moreover, as *Rivers* underscores in the context of the very type of claims at issue in this case, Acts of Congress that trigger Section 1658(a) by creating new causes of action inevitably will fall within *Landgraf*'s presumption against retroactive application, and so any retroactive effect will be expressly contemplated by Congress.

Congress presumably weighed the policy concerns expressed by the court of appeals concerning the administrability of Section 1658(a)'s arising-under rule and concluded that such concerns were outweighed by the significant federal interest served by creating a uniform (albeit prospective) federal limitations period for federal claims lacking such a period. Moreover, there is no reason to conclude that courts have encountered, or will encounter, any undue difficulty in determining which Section 1981 claims arise under the 1991 Act, and thus trigger Section 1658(a), and which Section 1981 claims do not. Accordingly, the court of appeals erred in holding that the claims at issue are governed by Illinois's two-year limitations rule for personal injury actions, instead of the uniform federal rule established by Section 1658(a).

ARGUMENT

THE UNIFORM STATUTE OF LIMITATIONS ESTABLISHED BY 28 U.S.C. 1658(a) GOVERNS ANY CLAIM FOR RACIAL DISCRIMINATION RELATING TO THE TERMS OR CONDITIONS OF EMPLOYMENT IN VIOLATION OF 42 U.S.C. 1981 THAT WAS NOT ACTIONABLE UNTIL THE CIVIL RIGHTS ACT OF 1991

A. Section 1658(a) Applies To Any Claim Or Cause Of Action That Was Created By Or Necessarily Depends On An Act Of Congress Enacted After December 1, 1990

1. This case is governed by elementary principles of statutory construction. First, Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Second, the Court "give[s] the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted). Third, when Congress uses legal terms of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); accord *Beck* v. *Prupis*, 529 U.S. 494, 500-501 (2000). And fourth, when a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); accord *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

2. Section 1658(a) says that, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [*i.e.*, after December 1, 1990] may not be commenced later than 4

years after the cause of action accrues." 28 U.S.C. 1658(a). As Judge Alito explained in his dissenting opinion in *Zubi* v. *AT&T Corp.*, 219 F.3d 220, 227 (3d Cir. 2000), the application of Section 1658(a) to the type of claims at issue in this case turns on the meaning of "three terms—'action,' 'Act of Congress,' and 'arising under'—each of which has a commonly understood legal meaning."

a. A "civil action" is a legal demand instituted in a court to enforce a right. See *Black's Law Dictionary* 26 (5th ed. 1979) ("Action" means "[t]he legal and formal demand of one's right from another person or party made and insisted on in a court of justice."); William C. Anderson, *A Dictionary of Law* 26 (1996) ("Civil action" seeks to "[r]ecover[] a private right or compensation for deprivation thereof."); Frederic J. Stimson, *Glossary of Technical Terms, Phrases, and Maxims of the Common Law* 7 (1881) ("Action" means "[t]he legal demand of one's right"; "[c]ivil action" is an action "to enforce a private right."). As the Tenth Circuit stated, "there is no question that 'civil action' as used in § 1658 means 'claim' or 'cause of action.'" *Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183, 1190 (10th Cir. 2002).

b. An "Act of Congress" is a law enacted in accordance with the procedures set forth in Article I, Section 7 of the Constitution. See *INS* v. *Chadha*, 462 U.S. 919, 945-951 (1983). "[A]ll Acts of Congress" are required to have an "enacting clause" that states: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." 1 U.S.C. 101. Acts of Congress are published in theUnited States Statutes at Large in the order in which they were enacted by each session of Congress and the Statutes at Large thus constitutes "legal evidence of laws." 1 U.S.C. 112.

c. In common parlance, "arise" means "[t]o come into being; originate." *American Heritage Dictionary* 99 (3d ed. 1992); see *Oxford English Dictionary* 445 (1933) ("Arise"

means "[t]o spring up, come above ground, into the world, into existence"). The term "arising under" also has a settled legal meaning in the jurisdiction context, the most familiar context where it is used, of which Congress presumably is aware. See *Beck*, 529 U.S. at 500-501; see also *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Article III, Section 2 of the Constitution states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties." As this Court observed in *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 492 (1983), "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn* v. *Bank of United States*, [22 U.S. (9 Wheat.)] 738 (1824)." In *Osborn*, Chief Justice Marshall explained that under Article III, a case arises under federal law whenever federal law "forms an ingredient of the original cause," even if "other questions of fact or of law may be involved in it." 22 U.S. (9 Wheat.) at 823; see also *Franchise Tax Bd.* v. *Laborers Vacation Trust*, 463 U.S. 1, 8-9 n.8 (1983).

More to the point, Congress itself has used the term "arising under" to establish the parameters of federal subject matter jurisdiction. See, *e.g.*, 28 U.S.C. 1331, 1338(a). In addition, Congress's use of the term "arising under" in the jurisdictional provisions of Title 28 of the United States Code—which governs the "Judiciary and Judicial Procedure"—tracks the way that Congress used the term in Section 1658(a) of Title 28. Compare 28 U.S.C. 1658(a) with 28 U.S.C. 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. 1338(a)

("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks."). The natural conclusion is that Congress intended Section 1658(a)'s use of "arising under" to have a similar meaning as Congress's use of that term in the well-known statutory jurisdiction provisions of the same title of the Code.

As this Court has explained, "[t]he most familiar definition of the statutory 'arising under' limitation is Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'" *Laborers Vacation Trust*, 463 U.S. at 8-9 (quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). But the Court also has instructed that "arising under" is an inclusive term and "that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow Pharm., Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986) (citing *Laborers Vacation Trust*, 463 U.S. at 9); see also *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) (a case may "arise under" federal law if "federal law is a necessary element of [a claim]"); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (The "general rule" is that federal-question jurisdiction is present when "right to relief *depends upon* the construction or application of the Constitution or laws of the United States.") (emphasis added).[3]

[3] In *Merrell Dow*, the Court held that "the presence of a federal issue in a state cause of action" is not sufficient to make the action one "arising under" federal law for purposes of Section 1331, when it is clear that Congress intended "no federal private cause of action" for violation of the federal law. 478 U.S. at 811-812; see *id.* at 812 ("The significance of the necessary assumption that there is no federal private cause of action * * * cannot be overstated."). There is no question that the rights at issue in this case are privately enforceable under federal law.

In *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830 (2002), the Court observed in the context of construing 28 U.S.C. 1338(a)'s "arising under" language, that a claim "arises under" patent law if either (1) "federal patent law creates the cause of action," or (2) "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law." The Court derived that formulation from the "same test" used "to determine whether a case arises * * * under § 1331," because, the Court stated, the "[l]inguistic consistency" of Section 1338(a) and Section 1331 "requires" that result. *Ibid.*; see *Christianson*, 486 U.S. at 808-809 (adopting same interpretation). "Linguistic consistency" likewise calls for a similar understanding of the term in interpreting the "arising under" language of Section 1658(a).[4]

[4] The term "arising under" is also found in other parts of the United States Code. For example, in *Heckler* v. *Ringer*, 466 U.S. 602 (1984), this Court recognized that 42 U.S.C. 405(h) bars a federal court from exercising federal question jurisdiction to hear "all 'claim[s] arising under' the Medicare Act." 466 U.S. at 615 (quoting 42 U.S.C. 405(h)). The Court further explained that it has construed Section 405(h)'s "'claim arising under' language quite broadly to include any claims in which 'both the standing and the substantive basis for the presentation' of the claims is the [Medicare Act]." *Ibid.* (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975)); see also *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 456 (1999) (applying same construction of Section 405(h)). Although it may be somewhat broader, *Heckler's* construction of Congress's use of the term "arising under" in Title 42 of the Code is generally consistent with the construction that this Court has given to the term in the jurisdictional provisions of Title 28 of the Code. To be clear, however, in light of the placement of Section 1658(a) in Title 28 of the Code and the fact that the use of "arising under" is much more well-known in the jurisdictional context, in our view the most natural reading of Section 1658(a) is that Congress intended to adopt the meaning of "arising under" used in the statutory jurisdiction context.

B. Section 1658(a) Governs A Demand Under Section 1981 Based On Racial Discrimination That Was Not Actionable Until Congress Enacted The Civil Rights Act Of 1991

Section 1658(a)'s four-year statute of limitations applies to a claim for racial discrimination relating to the terms or conditions of employment—a claim that this Court in *Patterson* held is "not actionable under § 1981," 491 U.S. at 171, 179, 189, and that sprang into existence with enactment of the 1991 Act.

1. Section 1658(a)'s terms lead directly to the conclusion that its four-year limitations period applies to petitioners' Section 1981 claims. Congress has not "otherwise provided" (28 U.S.C. 1658(a)) a statute of limitations for Section 1981 claims, and this case involves a "civil action," (28 U.S.C. 1658(a)), or "legal and formal demand" (*Black's Law Dictionary*, *supra*, at 26) for enforcement of a right that did not exist before December 1, 1990, but rather was created by an Act of Congress—the 1991 Act—that was passed in accordance with Article I, Section 7 of the Constitution, contains an enacting clause, and was signed by the President on November 21, 1991. 1991 Act, 105 Stat. 1071. Moreover, as explained next, petitioners' claims clearly "aris[e] under" (28 U.S.C. 1658(a)) the 1991 Act, from which they sprang to life.

2. Petitioners' Section 1981 claims "arise under" the 1991 Act under both the literal and legal meaning of that term. As this Court's decisions in *Patterson* and *Rivers* underscore, a cause of action under Section 1981 for racial discrimination relating to the terms or conditions of employment literally did not "come into being" (*American Heritage Dictionary*, *supra*, at 99) or "spring up" (*Oxford English Dictionary*, *supra*, at 445) until the 1991 Act. In addition, a claim under Section 1981 for discrimination relating to the terms or conditions of employment "arises under" the 1991 Act under the most common meaning that this Court has

ascribed to that term in the statutory context: the cause of action for such discrimination was created by the 1991 Act and, at a minimum, is necessarily dependent on that Act.

a. The 1991 Act clearly gave rise to causes of action that had never existed under Section 1981. As discussed, *Patterson* held that "racial harassment relating to the conditions of employment is not actionable under § 1981." 491 U.S. at 171. The term "actionable" denotes "[t]hat for which an action may be maintained; opposed to *non-actionable*." *A Dictionary of Law*, *supra*, at 26.[5] *Patterson* thus definitively establishes that—before 1991—Section 1981 did not supply a cause of action for discriminatory conduct relating to the terms or conditions of employment. And, as this Court emphasized in *Rivers*, 511 U.S. at 312-313 & n.12, that is "an authoritative statement" of the action that had "*always*" existed under Section 1981.

The 1991 Act originated causes of action that "had no legal existence before th[at] Act was passed." *Rivers*, 511 U.S. at 313. As discussed, the Act expanded Section 1981 to proscribe racial discrimination relating to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b); see *Rivers*, 511 U.S. at 303 (The 1991 Act "enlarged the category of conduct that is subject to § 1981 liability"). By enlarging the "[m]atter for which action may be maintained" under Section 1981, and "[t]he right[s] which a party has to institute a judicial proceeding" under Section 1981, *Black's Law Dictionary*, *supra*, at 201, the 1991 Act created new causes of action under Section 1981 for relief from discrimination. See *Harris*, 300 F.3d

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[5] See also *Black's Law Dictionary*, *supra*, at 27 ("Actionable" means "[t]hat for which an action will lie, furnishing legal ground for an action. (See **Cause of action** * * *)."); *id.* at 201 ("Cause of action" is "[m]atter for which action may be maintained"; "[u]nlawful violation or invasion of right"; "[t]he right which a party has to institute a judicial proceeding.").

at 1190 ("when Congress enacted § 1981(b), it * * * undeniably created new causes of action."); *Zubi*, 219 F.3d at 230 (Alito, J., dissenting) ("[I]n any realistic sense, Section 101 of the 1991 Act 'create[d] the cause of action' for racially discriminatory termination of employment."); note 5, *supra*.

Petitioners in this case allege that they were subject to racially discriminatory decisions concerning the termination and transfer of employment and a discriminatory work environment. J.A. 18-19. Those claims were "not actionable" under Section 1981 before the 1991 Act because, *Patterson* held, the rights guaranteed by Section 1981 did "not extend * * * to conduct by the employer after the contract relation has been established, including * * * imposition of discriminatory working conditions." 491 U.S. at 177. Indeed, *Patterson* itself involved a hostile work environment claim, *id.* at 178-179, and *Rivers* involved a discriminatory discharge claim, 511 U.S. at 301. This Court held that those claims were not actionable under Section 1981 before the 1991 Act. The 1991 Act, however, created causes of action for racial discrimination with respect to the terms and conditions of the contractual relationship, see 42 U.S.C. 1981(b); *Rivers*, 511 U.S. at 303, and thus gave life to the type of discrimination claims brought by petitioners here.

b. That Congress in the 1991 Act chose to expand an existing cause of action, rather than legislate on a tabula rasa, does not alter the conclusion that the claims at issue "arise under" the 1991 Act. At a minimum, Section 1981 claims alleging discrimination in the terms and conditions of employment "necessarily depend[] on" (*Holmes Group*, 535 U.S. at 830) the 1991 Act. The "important new legal obligations" (*Rivers*, 511 U.S. at 304) created by the 1991 Act indisputably constitute a necessary element of the Section 1981 claims at issue, because—*Patterson* establishes—before the 1991 Act those claims were not actionable at all. See

Christianson, 486 U.S. at 808 (a case may "arise under" federal law if "federal law is a necessary element of [a claim]") (quoting *Laborers Vacation Trust*, 463 U.S. at 13). Indeed, even the court of appeals recognized that "post-formation discriminat[ion] claims *depend on* * * * [Section 101] in the sense that the definitional language of that subsection makes clear that 'make and enforce' includes post-formation conduct." Pet. App. 24a (emphasis added). That dependency alone compels the conclusion that the claims at issue "arise under" the 1991 Act under the alternative definition of "arising under" that this Court has used in the statutory jurisdiction context. See p. 12, *supra*.

Furthermore, Section 1658(a) does not specify that a claim must *exclusively* arise under an Act of Congress enacted after December 1, 1990, only that it must "aris[e] under" such an Act. Nor would such an interpretation be consistent with the way that this Court has used the term "arising under" in the statutory jurisdiction context where that term is inclusive. Indeed, this Court has often recognized that a claim may arise under *federal* law even though it is based on a *state* cause of action or involves both state and federal law. See *Laborers Vacation Trust*, 463 U.S. at 9 ("We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law.") (citing cases); *id.* at 13. As a result, to the extent that petitioners' Section 1981 claims depend on Section 1981(a)—as well as Section 1981(b)—that in no way undermines the conclusion that those claims arise under the 1991 Act. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975) ("It would, of course, be fruitless to contend that appellees' claim is one which does not arise under the Constitution * * * . But it is just as fruitless to argue that this action does not also arise under the Social Security Act.") (applying 42 U.S.C. 405(h), discussed note 4, *supra*).

C. The Court Of Appeals Erred In Concluding That The Uniform Limitations Period Supplied By Section 1658(a) Does Not Apply To The Section 1981 Claims At Issue

The court of appeals grounded its contrary conclusion largely on policy and other secondary considerations. But none of the concerns identified by the court provides any reason to override the result clearly called for by the text of Section 1658(a).

1. The court of appeals reasoned that the *manner* in which Congress responded to *Patterson* barred application of Section 1658(a) to the claims at issue. The court emphasized that "Congress chose to overrule *Patterson* not by creating an entirely new statutory provision," but instead by "merely suppl[ying] a more precise definition to one of the rights already guaranteed by § 1981." Pet. App. 25a; see *id.* at 24a ("[I]t is 'only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies.'"). That analysis is flawed.

Most fundamentally, the court of appeals' reasoning is contradicted by the plain terms of Section 1658(a). Section 1658(a) is triggered when a claim "aris[es] under an Act of Congress enacted after [December 1, 1990]." The fact that an Act of Congress creates new rights by amending an existing statute, rather than by creating "a wholly new cause of action" without reference to another statute (Pet. App. 22a), is itself of no moment under Section 1658(a). See *Harris*, 300 F.3d at 1189-1190 ("[E]very Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is 'enacted'" and thus potentially may trigger Section 1658(a).).

Under the decision below, however, only a small fraction of Acts of Congress enacted after December 1, 1990, could ever trigger Section 1658(a), *i.e.*, the relatively few statutes that create an entirely free-standing cause of action. The

decision thus severely limits the application of Section 1658(a) on the basis of a criterion that has no footing in the text of that provision. Section 1658(a) makes clear that the proper focus is on the "Act of Congress enacted after [December 1, 1990]," not on how the statutory change is codified. Here, although the court of appeals recognized that petitioners' claims "depend on" (Pet. App. 24a) Section 101 of the 1991 Act, it found Section 1658(a) inapplicable simply because Section 101 amended an existing code provision.

The key question in determining whether Section 1658(a) applies is not whether an Act of Congress amends an existing statute or creates a free-standing cause of action, but instead whether the underlying claim *arises under* an Act of Congress enacted after December 1, 1990. Under the most common meaning of the phrase "arising under" used by this Court in the statutory context, the Section 1981 claims at issue here readily arise under an Act of Congress enacted after December 1, 1990, even though that Act amends an existing statute instead of creating an independent cause of action proscribing the same conduct. See Part B, *supra*; *Harris*, 300 F.3d at 1190 ("When Congress enacted § 1981(b), it * * * undeniably created new causes of action, whether or not that is how it chose to label what it had done.").

So too, for example, if Congress amended a statute that prohibited discrimination on the basis of gender (and did not specify a limitations period) to prohibit discrimination on the basis of national origin as well, a claim for national origin discrimination would arise under the new Act, and thus be governed by Section 1658(a). Conversely, if the amendment simply changed the applicable burden of proof, a subsequent claim under the statute would not arise under the new Act, or trigger Section 1658(a). An Act that changes the burden of proof or procedures governing a claim typically does not create a new right to maintain an action. In addition, although the new burden of proof might decide the success

or failure of the claim on the merits, the plaintiff's right to maintain the action would not *necessarily* depend on the new burden or procedure specified by Congress.

Nor is it significant, as the court of appeals believed, that the 1991 Act "merely supplied a more precise definition to one of the rights already guaranteed by § 1981." Pet. App. 25a. As this Court explained in *Rivers*, "[a]ltering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." 511 U.S. at 308. Congress could have created a new cause of action for post-formation discrimination which *Patterson* held not actionable by fashioning a stand-alone statutory section, adding a wholly independent subsection to Section 1981, or, as it did, expanding the definition of the conduct covered by the existing provision. The substantive effect—*i.e.*, the creation of new rights of action and corresponding liabilities —would be exactly the same under each alternative. Congress's concern presumably is the substantive effect of its Acts, not the particular manner in which they are reflected in the United States Code. Indeed, to a degree, the Office of Law Revision Counsel, and not Congress as a deliberative body, ultimately chooses the form that a law takes when it makes its way into the Code. See 2 U.S.C. 285b; see also *North Dakota* v. *United States*, 460 U.S. 300, 311 n.13 (1983); *United States* v. *Welden*, 377 U.S. 95, 98-99 n.4 (1964); *Turner* v. *Glickman*, 207 F.3d 419, 428-429 (7th Cir. 2000).

The salient point is that, in this instance, the new definition created by Congress "create[d] liabilities that had no legal existence before the Act was passed." *Rivers*, 511 U.S. at 313. Likewise, this Court rejected the plaintiffs' argument in *Rivers* that the fact that "§ 101 operates as a gloss on the terms 'make and enforce contracts,'" altered the conclusion that "the important new legal obligations § 101 imposes bring it within the class of laws that are presumptively prospective." *Id.* at 304-305. So too, the fact that Congress

chose to expand the definition of the rights protected by Section 1981 does not alter the fact that in doing so it created significant new causes of action under Section 1981.

2. The court of appeals pointed to the fact that, in enacting Section 1658(a), "Congress * * * was concerned with disrupting litigants' settled expectations." Pet. App. 21a; see *id.* at 23a. In particular, the court relied on a statement in a committee report accompanying Section 1658(a), explaining the committee's decision to reject a proposal "to provide a fallback statute of limitations for *previously enacted legislation* lacking a limitations period" and instead to limit Section 1658(a) to prospective application. *Id.* at 21a-22a (emphasis added) (quoting H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990)). The committee's statement, however, does not support the court of appeals' interpretation in this case because recognizing that Section 1658(a) applies to claims arising under the 1991 Act does not disrupt the "settled expectations" of any litigants with respect to "previously enacted legislation." *Ibid.*

Congress squarely addressed the concern expressed in the committee report by making Section 1658(a) prospective, *i.e.*, by limiting Section 1658(a)'s four-year limitation period to claims "arising under an Act of Congress enacted *after the date of the enactment of [Section 1658].*" 28 U.S.C. 1658(a) (emphasis added). Applying Section 1658(a) to a claim that arises under the 1991 Act—which was enacted after Section 1658(a), and which *Rivers* held applies only prospectively—in no way disrupts the "settled expectations" of parties. As Judge Alito put it in *Zubi*, "[b]efore the enactment of the Civil Rights Act of 1991, no employer in New Jersey could have had a settled expectation that an action for discriminatory discharge brought under § 1981 would be subject to the state's two year statute of limitations for personal injury actions, since prior to that time, § 1981 did not authorize such an action at all. It was not until the 1991 Act that such an

action was possible, and by that point § 1658 had been enacted." 219 F.3d at 231 (dissenting). Accordingly, after enactment of Section 1658(a), the only reasonable expectation that an employer or employee could have had with respect to the limitations period that applies to a claim arising under the 1991 Act is that such a claim would be governed by the four-year period in Section 1658(a).[6]

The court of appeals not only erred in focusing on Congress's objective of not disrupting expectations under "previously enacted legislation," Pet. App. 21a, but it failed to account for the important interests served by subjecting federal claims to a uniform federal limitations period, as opposed to a varying limitations period borrowed from the law of the forum state. As Justice Scalia observed in *North Star Steel Co.* v. *Thomas*, 515 U.S. 29 (1995), "a uniform nationwide limitations period for a federal cause of action is *always* significantly more appropriate" than a limitations period that varies based on the law of the forum state. *Id.* at 37 (concurring in the judgment); see also *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring) ("express[ing] reservations about the principle of 'borrowing' a period of limitations from one statute for use with another"), cert. denied, 501 U.S. 1250 (1991).

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[6] Under the *Landgraf-Rivers* analysis, any Acts of Congress that create new causes of action or liabilities, and thus trigger Section 1658(a)'s "arising under" language, necessarily will presumptively apply only prospectively. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994) (a statute is presumed to have only a prospective effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"). As a result, Congress's own decision to apply Section 1658(a)'s presumptive limitations period only prospectively combined with this Court's retroactivity jurisprudence fully addresses any concerns about disrupting settled expectations.

The committee report cited by the court of appeals itself acknowledges the problems posed by borrowing limitations periods from state law for federal causes of action. As the committee explained:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. * * * It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

H.R. Rep. No. 734, *supra*, at 24; see 136 Cong. Rec. 36,292 (1990) ("Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack persuasive support as a matter of policy" and "results in undesirable variance among the federal courts.") (statement reporting bill to Senate). For similar reasons, the 1990 *Report of the Federal Courts Study Committee* (at 93) leading to Section 1658(a), urged Congress to establish uniform federal limitations periods for federal causes of action as well as a catch-all, federal limitations period for causes of action for which Congress has not established a specific limitations period.[7]

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[7] An analysis prepared for the Workload Subcommitee of the Federal Courts Study Committee focused on the problem posed by borrowing state statutes of limitations for federal claims lacking a federal limitations period and concluded that "there is little to be said in favor of the current situation and there seems to be no identifiable support for continuing this situation." Memorandum from R. Marcus, Assoc. Reporter, to Workload Subcomm. at 1 (Sept. 1, 1989), *reprinted in* 1 Federal Courts Study Committee, *Working Papers and Subcomm. Reports* App. (1990). In particular, the report emphasized that borrowing state limitations periods for

In *North Star Steel Co.*, 515 U.S. at 34 & n.*, this Court itself recognized that, whereas the expectation has been that federal courts may borrow a limitations period from state law when a federal statute does not establish a limitations period, "[t]he expectation is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. § 1658 (1988 ed., Supp. V)." In focusing on Congress's apparent interest to avoid the disruption of litigants' settled expectations under "previously enacted legislation," H.R. Rep. No. 734, *supra*, at 24, the court of appeals overlooked Congress's intent to ensure that Section 1658(a)'s limitations period would apply on a prospective basis to any claims arising under an Act of Congress enacted *after* December 1, 1990.

3. The court of appeals likewise disregarded the express statutory preference established by 42 U.S.C. 1988(a) for applying federal rules in adjudicating civil rights claims. As this Court has explained, Section 1988(a) establishes a "'three-step process' for determining the rules of decision applicable to civil rights claims," including claims under Section 1981. *Wilson*, 471 U.S. at 267. The first step is to look to "the laws of the United States, so far as such laws are suitable to carry [the Civil Rights Acts] into effect." 42 U.S.C. 1988(a). As this Court has observed, that "mandate implies that resort to state law—the second step in the process—should not be undertaken before principles of federal law are exhausted." *Wilson*, 471 U.S. at 268. The third step is to apply state law, but only "'so far as the same is not inconsistent with' federal law." *Id.* at 269 (quoting 42 U.S.C. 1988(a)). Section 1988(a) thus explicitly directs courts to

federal claims creates uncertainty for litigants, "makes outcomes very different for federal claimants in different places, invites forum shopping, and poses problems for joint resolution through class actions or related measures." *Id.* at 10.

give effect when feasible to "the predominance of the federal interest" in adjudicating federal civil rights claims. *Ibid.*

Section 1658(a)'s own terms establish that it applies to the civil rights claims at issue. But if there were any doubt about whether such claims are governed by Section 1658(a) or a state limitations period, then Section 1988(a) would require that such doubt be resolved in favor of applying the federal period supplied by Section 1658(a). Section 1658(a)'s four-year period is clearly "suitable to carry [the Civil Rights Acts] into effect." 42 U.S.C. 1988(a). Four years provides a uniform and fair limitations period for Section 1981 claims created by the 1991 Act. Indeed, limitations periods that courts have borrowed from state law in Section 1981 actions range from two to six years.[8] Therefore, this case should be guided by Congress's "first instruction" in Section 1988—"that the law to be applied in adjudicating civil rights claims shall be in 'conformity with the laws of the United States, so far as such laws are suitable.'" *Wilson*, 471 U.S. at 268; see also *id.* at 270 n.21.

4. The court of appeals found it "highly significant" that a committee report accompanying the 1991 Act stated that, "[i]n the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes of limitations." Pet. App. 25a-26a (quoting H.R. Rep. No. 40, 102 Cong., 1st Sess. Pt. 1, at 63 (1991)). That statement, however, does not shed any light on this case. It comes from a section of a committee report that is addressed to a provision of the 1991 Act *other than* Section 101 of that Act—the provision that gave rise to the claims at

[8] See, *e.g.*, Pet. App. 26a-27a (two years); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (two years); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 358 n.1 (D.C. Cir. 1982) (three years); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987) (six years).

issue in this case. See H.R. Rep. No. 40, *supra*, at 62-63. Moreover, the statement accurately describes the statute of limitations that *historically* had been applied in Section 1981 actions. *Ibid.* But the committee's historical observation that "courts applying [Section 1981] have looked to analogous state statutes of limitations" (*id.* at 63) does not illuminate the committee's views on whether a Section 1981 claim that were to arise—in the future—under a different provision of the 1991 Act (Section 101) would be governed by Section 1658(a).

In any event, a statement in a committee report cannot override "the conclusion * * * directed by the text of [a statute]," let alone a completely different statute passed by a previous Congress. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119-120 (2001); see *United States* v. *Gonzalez*, 520 U.S. 1, 6 (1997). This Court has "often observed" that the views of a subsequent Congress, much less a subsequent committee report, are "a hazardous basis for inferring the intent of an earlier [Congress]." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998). The committee report touted by the court of appeals contains no reference to Section 1658(a), and in all likelihood the staffer who drafted that report did not have Section 1658(a) in mind when describing the historical practice of borrowing limitations periods in Section 1981 actions. Indeed, the statement relied on by the court of appeals appears to have been simply lifted verbatim from earlier committee reports accompanying precursor bills to the 1991 Act, which were prepared *before* Section 1658(a) was even enacted into law in December 1990. See H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1, at 37, (1990) (describing same borrowing practice); S. Rep. No. 315, 101st Cong., 2d Sess. 29 (1990) (same).

5. The court of appeals speculated that applying Section 1658(a)'s statute of limitations to Section 1981 claims that arise under the 1991 Act and a different limitations period to

Section 1981 claims that do not would be impractical. Pet. App. 23a. Congress presumably weighed such policy concerns in enacting Section 1658(a), and, in any event, such concerns provide no basis for a court to override the result directed by the text of that statute. See *Holmes Group*, 535 U.S. at 833 ("Our task here is not to determine what would further Congress's goal of ensuring patent-law uniformity, but to determine what the words of the statute must fairly be understood to mean."); *Zubi*, 219 F.3d at 231 (Alito, J., dissenting) (In devising Section 1658(a), "Congress obviously thought that interests other than clarity and ease of application also had to be served to at least some degree."). That is particularly true because the final version of Section 1658(a) reflects a legislative compromise between interests favoring a more expansive provision that applied to any "previously enacted legislation lacking a limitations period" and interests favoring a more limited prospective approach. H.R. Rep. No. 734, *supra*, at 24.

At the same time, there is no reason to believe that applying Section 1658(a)'s four-year statute of limitations to Section 1981 claims arising under the 1991 Act will prove unworkable or unfair. As the Tenth Circuit observed in *Harris*, "courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit." 300 F.3d at 1191. Indeed, many lawsuits involving claims under Section 1981—including at least initially this case, see Pet. App. 29a—also involve claims under Title VII. Title VII specifies a different limitations framework for claims than the one in Section 1658(a). See 42 U.S.C. 2000e-5(e)(1); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109-110 (2002).

In addition, in the typical case, there is not likely to be confusion as to whether a Section 1981 claim arises under the 1991 Act. As discussed, the 1991 Act and *Patterson* draw a bright line based on whether a claim concerns "postforma-

tion conduct by the employer relating to the terms and conditions of continuing employment." *Patterson*, 491 U.S. at 179; see *Harris*, 300 F.3d at 1192-1193 & n.1. Courts did not find any undue difficulty in policing that line in assessing the lawfulness of pre-1991 conduct in light of *Rivers*'s holding that the 1991 Act is not retroactive. Moreover, in many cases there may be no need for any inquiry into whether a plaintiff's Section 1981 claims are governed by Section 1658(a) or a limitations period borrowed from state law because the claims would be timely (or not) regardless of which period applies, or because only one type of discrimination is alleged under Section 1981.

* * * * *

There is no dispute that the Section 1981 claims at issue in this case were "not actionable under § 1981" (*Patterson*, 491 U.S. at 179) when Congress enacted Section 1658(a), and that those claims are actionable today by virtue of the 1991 Act. The court of appeals' ruling that Section 1658(a) does not govern those claims is premised on the conclusion that the claims do not arise under the 1991 Act, but instead arise under the very statute at issue in *Patterson*. See Pet. App. 24a. That ruling defies common sense, contradicts Section 1658(a)'s terms, and severely undercuts the applicability of the uniform statute of limitations devised by Congress in Section 1658(a) to redress one of the major problems identified by the Federal Courts Study Committee.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
J. MICHAEL WIGGINS
Acting Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
DENNIS J. DIMSEY
LINDA F. THOME
Attorneys

AUGUST 2003

APPENDIX

1. Section 1658 of Title 28 United States Code provides:

§ 1658 Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

2. Section 1981 of Title 42 United States Code provides:

§ 1981 Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.